Genetics. Applications within the Spanish criminal proceedings

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The development of neuroscience and genetics has incremented the relations between such sciences and criminal law and procedure. In Spain, the observation of the evolution in case law of the different forms of relation between neuroscience and genetics and criminal law and procedure renders a framework not so far from the current tendency to the punitive hypertrophy and to the relaxation of procedural guarantees.

Thus, from a substantive standpoint, the progresses in genetics or in neurobiology allow us to abstract an important conjunction of hypotheses according to which the behaviour of the author of crime is strongly, if not unavoidably, united to biological conditionings, later amplified by environmental circumstances. Before such evidence, which some of our speakers gave abundant account of in recent bibliography, Spanish criminal law is evolving slowly or, simply, is not evolving at all. If the genetic bond (totally or much) determining the criminal behaviour cannot relate to the existence of a serious mental anomaly based on psychiatrics, genetic reasons will not be important for criminal law, which will follow judging the author as a free man, giving general-preventive messages through the reaffirmation of the norm implying his judgement and sentencing and reflecting on the author special-preventive messages of impossible real effectiveness.

From a procedural point of view, without any doubt, before the above resistances, criminal procedure law has been extraordinarily more permeable to the reception of genetic techniques. In the last decades, through the decomposition of DNA and the obtainment of genetic markers (whether codified or not), the rational exclusion from the group of possible authors of the 99,9% of the world population has became possible – which, *contrario sensu*, means the qualification as authors of those whose markers coincide with the analysed samples. We said that criminal procedure has been more permeable, because if the advantages of genetic identification are indubitable and consent the reduction of the margin of error in the attribution of the fact, at the time the questions on guarantees concerning the collection of samples, their analysis, the chain of custody, samples records etc. are many, which does not hinder the positive recognition in procedure legislation of such a technique of identification nor the Courts' validation of the irregularities that often surround its practice.

In sum, the fundamental thesis is not so different from the critique uphold by wide sectors of the scientific community with regard to the ends of criminal law. The idea of armoured States facing the terrorist threat, the increasingly evident creation of a criminal law of the enemy, (extremely) fast judgments, the collapsing Administration of justice created a criminal law every day more neoretributivist strongly committed to the protection of victims and every day

more detached from the Listzian idea of criminal law as the Magna Carta of the delinquent.

Hence, it would be easier to filter the progresses of genetics in the identification of the author of crime, with the risk of systematic violations of the process for obtaining samples, and therefore validating high margins of error and violations of fundamental human rights, instead of filtering the progresses of genetics in the investigation of the root of crime and criminal law's capacity to build coherent alternatives to punishment for the prevention of crime and the reparation of the harm caused.

Even when science should be able to explain the unavoidability of the fact as a consequence of a certain genetic codification, States would follow recurring to punishment as a way to reaffirm legal order, as a general-preventive formula etc. Be it rational or not, be it effective or not, it will be far easier to continue with old mechanisms instead of devising new responses to such sort of cases (see, in this sense, the seventh chapter of Eagleman's essay *The secret lives of the brain*, 2013).

Finally, genetics created a field of experimentation for therapeutic purposes which may at time create ethical risks. And more than ethic risk, the risk of harm to legal goods firmly rooted in the values of community. This is the reason why the majority of world penal legislations, included Spain, promptly incorporated criminal offences tending to prevent the excesses of genetic experimentation. Criminal offences which have more a symbolic or promotional value, rather than a concrete practical application. To the extent that in one occasion only our Courts have dealt with such offences, to reject the religious argument as a device to interpret the precept's scope.